MOHD NASIR SHAMSUDDIN

v.

INSPECTOR-GENERAL OF POLICE & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
STEVE SHIM J
[SUIT NO: 22-30-96-III]
9 DECEMBER 1996

ADMINISTRATIVE LAW: *Rights and liabilities of public servants - Dismissal of police inspector for breach of code of conduct - Officer charged with dishonest misappropriation - Magistrate discharged officer not amounting to acquittal - Inspector General of Police dismissed officer three years later - Whether officer entitled to receive any unpaid salary withheld during that period - Whether failure to hold inquiry before dismissing officer fatal - Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, General Orders 26(5), 27(5) and 29*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Delegation of power - Dismissal of police inspector - Show cause letter not signed by Inspector General of Police - Whether breach of principle of delegation of power*

The plaintiff, a police inspector, was charged with an offence under s. 406 of the Penal Code, to wit dishonest misappropriation or disposal of property which he had been entrusted with or had dominion over. He was then interdicted and suspended from performing his duties. After the trial in the magistrates' court, he was discharged not amounting to an acquittal. About three years later, the plaintiff received a show cause letter from the Penolong Ketua Urusetia (Tatatertib) to which he responded with a letter of representation. Subsequently he was, informed of his dismissal from the police force.

The plaintiff prayed for the following reliefs: (i) a declaration that his dismissal was null and void; (ii) an order that he was still a member of the police force holding the rank of inspector; (iii) an order that an account be taken of all salaries, emoluments and other benefits lawfully due to him from the date of interdiction; and (iv) an order that he be reinstated and be allowed to resume his duties. Counsel for the plaintiff submitted that: (a) in dismissing the plaintiff the defendants had resorted to unfair procedure, which was in breach of General Orders 26(5), 27(5) and 29 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 ('G.O.'); and (b) there was a breach of the principle of delegation of powers in the issuance of the show

cause letter and letter of dismissal which were not signed by the first defendant.

Held:

[1] General Order 27(5) stipulates that where an officer had been acquitted (including a discharge not amounting to an acquittal) on a criminal offence and no appeal is lodged against the acquittal, the officer shall be allowed to resume his duties and receive any unpaid salary withheld during the period of his interdiction. Thus after the plaintiff had been discharged not amounting to an acquittal, the defendants should have allowed him to resume his duties and paid him the salary withheld while he was interdicted. Their failure to so was a breach of G.O. 27(5).

[2] General Order 29 provides that an officer who is acquitted shall not be dismissed on the charge upon which he is acquitted. In this case, the plaintiff had been discharged not amounting to an acquittal on the charge of dishonest misappropriation under s. 406 of the Penal Code, whereas the grounds upon which he was dismissed were based on; gross negligence or gross dereliction of duty pertaining to his failure to hand over certain exhibits to the Ketua Polis Daerah; keeping the exhibits at his house; and causing the misappropriation or loss of the said exhibits. Therefore, it could not be said that the grounds for the plaintiff's dismissal were the same or substantially the same as those on which he had been discharged by the court.

[3] The appointment of a Committee of Inquiry under G.O. 26(5) in this case was a matter within the discretion of the Inspector General of Police ('IGP'). Since, the Acting IGP had thought it sufficient to dismiss the plaintiff on the basis of the grounds stated in the show cause letter and after considering the plaintiff's letter of representation, there was no merit on the contention of unfair procedure.

[4] In the instant case, the absence of an oral hearing did not cause any prejudice to the plaintiff. The charges against the plaintiff contained sufficient particulars and information to enable him to respond fully and effectively, and the plaintiff had in fact submitted a lengthy representation.

[5] The disciplinary action against the plaintiff was actually taken by the Acting IGP. The Penolong Ketua Urusetia (Tatatertib) had merely conveyed the decision of the Acting IGP as a conduit and nothing more. Thus the question of delegation of power did not arise.

[6] The plaintiff had succeeded only in his claim for the unpaid portion of his salaries from the date of his interdiction to the date of dismissal. In view of the plaintiff's partial success, he was awarded half the costs of the application.

[Application allowed in part.]

Case referred to:

Raja Abdul Malek Muzzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 ***(foll)***

Legislation referred to:

Penal Code, s. 406

Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, General Orders 26(5), 27(5) & 29

For the plaintiff - Walter Dior; M/s Dior & Co, Advoc
For the defendants - Ahmad Razif, FC

Reported by Anne Khoo

JUDGMENT

Steve Shim J:

By a writ of summons dated 16 April 1996, the plaintiff prayed for the following reliefs against the 1st and 2nd defendants: (a) a declaration that the dismissal of the plaintiff from the police force on 11 March 1994 was null and void and of no effect; (b) an order that the plaintiff was still a member of the police force holding the rank of an inspector; (c) an order that an account be taken of all salaries, emoluments and other benefits lawfully due to the plaintiff from the date of interdiction; (d) an order that the plaintiff be reinstated and be allowed to resume his duty as an inspector and be allowed to resume his duty as an inspector and (e) costs.

At the outset, it is necessary to set out briefly the undisputed facts, namely. that on 17 August 1990, while the plaintiff was then attached to the prosecution branch at the Central Police Station, Kuching, as a prosecuting officer holding the rank of an inspector, he was arrested and charged with an offence under s. 406 of the the Penal Code at the magistrate's court, Kuching; that soon after on 13 September 1990 he was interdicted and suspended from performing his duties; that on 11 December 1990 he was discharged not amounting to an acquittal by the magistrate's court; that on 12 October 1993, he received a show cause letter from Penolong Ketua Urusetia (Tatatertib) which he promptly responded with a letter of representation; that thereafter

on 11 March 1994, he received a letter from Timbalan Pengarah Pengurusan (Tatatertib) informing him of his dismissal from the police force with immediate effect.

The plaintiff gave evidence which substantially covered the facts tabulated above. In addition, he testified that he was in fact orally informed by his Officer-in-Charge of Prosecution. ASP Leong Shak Cheng that he would be interdicted as from 16 April 1990 although he was subsequently issued with the official letter of interdiction dated 13 September 1990.

At the close of the plaintiff's case. Federal Counsel Encik Ahmad Razif bin Mohd. Sidek indicated to the court that he would not be calling any witness or witnesses for the defence but would submit there was no case for the defendants to answer on the basis of the undisputed facts and the documentary exhibits in the Agreed Bundle of Documents. He therefore tendered a written submission and the bundle of authorities. He submitted that the dismissal of the plaintiff was done in accordance with law, namely, (a) that a show cause letter was issued to the plaintiff, (b) that in response, the plaintiff made out a lengthy letter of representation; (c) that the Ketua Polis Negara having considered the plaintiff's letter of representation, decided to dismiss him and (d) that the letter of dismissal did not infringe the principle of delegation of power.

Encik Walter Dior, counsel for the plaintiff also tendered a written submission. The main thrust of his submission was twofold, namely (1) that the defendants had resorted to an unfair procedure in dismissing the plaintiff and (2) that there was a breach of the principle of elevation of power in the issuance of the show cause letter and the letter of dismissal of the plaintiff. As regards (1) above, Encik Dior listed out a number of instances which, according to him tended to cast doubt on the fairness of the procedure adopted by the 1st defendant dismissing the plaintiff. Of these, only four, in my view, warrant consideration. I shall deal with them separately.

The first instance related to the apparent infringement or contravention of General Order 27(5) of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980. Here, Encik Dior submitted that after the plaintiff had been discharged not amounting to an acquittal by the magistrate's court, he should have been allowed to resume his duty and to receive the unpaid portion of his salary withheld from him whilst under interdiction. It is of course common ground that the plaintiff had been charged with an offence under s. 406 of the Penal Code in the magistrate's court, Kuching, but was subsequently discharged not amounting to an acquittal after the Deputy Public Prosecutor had indicated to the court that he had instructions to withdraw the

charge against the plaintiff. The plaintiff was already under interdiction at the time. And subsequently on 11 March 1994, he was dismissed from the police force. Thus, as from 11 December 1990 (the date of the discharge not amounting to an acquittal) coupled with the period of time for which an appeal could have been lodged by the Deputy Public Prosecutor until 11 March 1994, there was a lapse of over three years before the 1st defendant took the ultimate action of dismissing the plaintiff. Encik Dior submitted that in the circumstances there was a breach of the said General Order 27(5) on the part of the 1st defendant. General Order 27(5) stipulates:

> (5) Where criminal proceedings against the officer result in his acquittal and no appeal is lodged against the said acquittal by or on behalf of the Public Prosecutor, the officer shall be allowed to resume duty and he shall be allowed to receive the unpaid portion of his emoluments withheld from him whilst under interdiction. But where an appeal is lodged against the said acquittal the Appropriate Authority shall decide whether or not the officer should continue to remain under interdiction until the said appeal is finally disposed of.
>
> In this General Order the term 'acquittal' includes a discharge not amounting to an acquittal.

In my view, the provisions above are clear enough. Where an officer has been charged and acquitted of a criminal offence and no appeal is lodged against the acquittal, the said officer shall be allowed to resume his duty and also to receive any unpaid salary withheld from him during the period of his interdiction, but if an appeal is lodged, then the relevant authority could decide whether or not the said officer should continue to remain under interdiction until the final disposal of the appeal. The same General Order also states that the term "acquittal" includes a discharge not amounting to an acquittal.

In the instant case, from the admitted documents, it seems clear that after the plaintiff had been discharged not amounting to an acquittal by the magistrate's court, Kuching, on 11 December 1990, the defendants took no action against the plaintiff and only after a lapse of about three years later on 12 October 1993 did they proceed to issue him a show cause letter followed by the letter of dismissal on 11 March 1994. In my view, the defendants should have allowed the plaintiff to resume his duty after the expiration of the appeal period consequent upon the order of discharge not amounting to acquittal made by the magistrate's court and also to pay him the unpaid portion of his salary withheld from him whilst under interdiction. They did neither of those things and no explanation has been forthcoming. In the circumstances, I hold that there has heen a breach of General Order 27(5) aforesaid.

The second point of contention relating to unfair procedure canvassed by Encik Dior concerns General Order 29. He submitted that the defendant, by taking disciplinary action against the plaintiff on the basis of the four charges which contained substantially the same issues upon which the plaintiff was earlier discharged not amounting to an acquittal by the magistrate's court, had contravened the provisions of General Order 29 which stipulates:

> An officer who is acquitted shall not be dismissed on the charge upon which he is acquitted but nothing in this General Order shall prevent disciplinary action from being taken against the officer on any other grounds arising out of his conduct in the matter whether or not connected with the performance of his duties provided that the said grounds do not raise substantially the same issues as that on which he is acquitted.

It is important, I think, to examine the criminal charge preferred against the plaintiff in the magistrate's court. Therein he was charged with an offence under s. 406 of the Penal Code. The ingredients necessary to sustain that offence are as follows: (1) the accused has been entrusted with property or with dominion over the property; (2) the accused (a) dishonestly misappropriated the said property or converting it to his own use or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation – (i) of any direction of law prescribing the mode in which such trust is to be discharged or (ii) of any legal contract made touching the discharge of such trust. Thus, dishonest intention is the gist of the offence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may be dishonest without being reallty so. Mere retention of property entrusted to a person without any misappropriation is not criminal breach of trust.

Given the ingredients necessary to sustain the offence under s. 406 foresaid, what then do the charges upon which the plaintiff was dismissed entail in the present case? Looking at the four charges specified in the show cause letter exh. P5 they are essentially based on instances of gross negligence or gross dereliction of duty on the part of the plaintiff. The first charge relates to the plaintiff's failure to hand over certain exhibits to the Ketua Polis Daerah or his deputy or a court officer. The second charge relates to keeping the exhibits in his own house when he should not. The third charge relates to his irresponsible conduct in having kept the said exhibits in such a manner as to facilitate misappropriation thereof by his wife. And the fourth charge relates to his having lost the said exhibits thereby causing disrepute to the public service under which he served. In none of the four charges in question is there any allegation that the plaintiff had, at all material times, dishonestly misappropriated the said exhibits himself or that he had dishonestly converted

them to his own use or that he dihonestly used them or disposed of them or had wilfully suffered any other person to do so, etc. It is quite obvious that the charges relied upon by the 1st defendant in dismissing the plaintiff form a concerted attack upon his general conduct in the performance of his duties – that he was grossly negligent in the handling of the exhibits under his care, custody and control at all material times. They are certainly not directed at any dishonest intention on the part of the plaintiff in relation to the said exhibits. In the circumstances therefore it cannot be said that the grounds of dismissal are the same or substantially the same as those for which the plaintiff was charged in the magistrate's court and subsequently discharged not amounting to an acquittal. They might have been concerned with the same exhibits but the nature and character of the charges are entirely dissimilar, one being concerned with a criminal offence and the other with gross negligence or gross dereliction of duty. That belng the case, there has been no contravention of General Order 29 aforesaid.

The third point raised by Encik Dior on unfair procedure related to the failure on the part of the defendants in resorting to the provisions of General Order 26(5) which stipulates:

> (5) Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a committee of Inquiry consisting of not less than two senior Government Officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

Quite obviously, the appointment of a Committee of Inquiry is a matter within the discretion of the relevant authority, in this case, the Pemangku Ketua Polis Negara. Here, the Pemangku Ketua Polis Negara had thought it sufficient to dismiss the plaintiff on the basis of the grounds stated in the show cause letter and after considering the letter of representation submitted to him by the plaintiff. In the circumstances, I do not think there is any merit in the above contention.

The fourth point raised by Encik Dior concerning unfair procedure is a complaint that the plaintiff was not afforded an oral hearing by the defendants before he was dismissed from the police force. Encik Dior cited in support the case of *Raja Abdul Malek Muzzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors.* [1995] 1 CLJ 619, wherein the brief facts were that the Police Services Commission by a letter dated 16 December 1988 wrote to the plaintiff informing him of the Commission's

decision to institute disciplinary proceedings against him on charges *inter alia* of gross dereliction of duty and corruption; that the plaintifff responded by giving a full explanation of the allegations against him and requested for an oral hearing as well as for certain documents to be supplied to him; that he made further written response to the allegations; that no oral hearing was granted and on 4 April 1990, the Commission informed the plaintiff of its decision to dismiss him after considering his explanations in the two letters and **"the other information."** In his appeal to the Court of Appeal, the plaintiff complained that there was a failure on the part of the Commission to afford him an oral hearing and therefore he was deprived of the right to be heard. On this issue Gopal Sri Ram JCA held as follows:

> The right to be heard does not in all cases include the duty to afford an oral hearing. Nevertheless, it does not mean that the failure or refusal to afford such a hearing may not be challenged. In the present case, the absence of an oral hearing did not occasion any prejudice to the plaintiff. The charges were well drafted and care was taken to ensure that full particulars were provided. Sufficient opportunity was given to the plaintiff to make representations to rebut the charges.

Taking the cue from his Lordship, I have to say that, in the instant case, having regard to the undisputed facts and all the circumstances, the absence of an oral hearing did not cause any prejudice to the plaintiff. The four charges against the plaintiff contained sufficient particulars and information to enable him to respond fully and effectively. Indeed the plaintiff submitted a lengthy representation consisting of seven type-written pages. In my view, he was given ample opportunity to defend himself against the charges levelled against him.

It should be noted that in Raja Abdul Malek Muzzaffar Shah bin Raja Shahruzzaman, *supra*, the plaintiff had also contended that the Police Services Commission had, in dismissing him from the police force, taken into account material information which had never been put to the plaintiff and without giving him the opportunity of commenting on it. In this connection, Gopal Sri Ram JCA held that the words **"and other information"** in the letter of dismissal dated 4 April 1990 left a reasonable man with the distinct impression that the defendants had considered material information that was never put to the plaintiff. A fair procedure includes the duty of an arbiter not to take into account matters that have not been first put to the accused with an opportunity for him to rebut them.

In the present case, there is nothing to indicate or suggest that the Pemangku Ketua Polis Negara had taken into account material information other than the four charges specified in the show cause letter exh. P5. It cannot therefore be said that the defendants had considered material information that was never

put to the plaintiff. It is quite obvious from the dismissal letter exh. P8, that the plaintiff was dismissed purely on the basis of the four charges in the said show cause letter and after, the 1st defendant had considered the letter or representation made by the plaintiff. For all the reasons given, I find no merit in Encik Dior's contention above.

I now come to the second main contention of the plaintiff, namely, that there was a breach of the principle of delegation of power. Here, Encik Dior had submitted that the show cause letter exh. P5 and the dismissal letter exhibit P8 were defective in that they were not personally issued and signed by the Ketua Polis Negara. First, I think it significant to look at the documents themselves. In the show cause letter exh. P5, the opening words used therein are as follows:

> Adalah saya diarah memaklumkan bahawa Pemangku Ketua Polis Negara pada menjalankan kuasa-kuasa yang telah diwakilkan kepadanya olih Suruhanjaya Pasukan Polis melalui P.U.B.(B) 621 bertarikh 19/12/85, telah memutuskan untuk mengambil tindakan tetatertib terhadap anda ...

The said letter was signed by Penolong Ketua Urusetia KPN (Tatatertib) on behalf of the Pemangku Ketua Polis Negara. Clearly, the disciplinary action against the plaintiff was actually taken by the Pemangku Ketua Polis Negara. The Penolong Ketua Urusetia KPN (Tatatertib) was merely conveying the decision taken by the Pemangku Ketua Polis Negara. He was only acting as a conduit for the Pemangku Ketua Polis Negara and nothing more.

In the dismissal letter dated 11 March 1994 exh. P8, para. 3 therein states as follows:

> 3. Olih yang demikian, pada menjalankan kuasa-kuasa yang diwakilkan kepadanya olih Suruhanjaya Pasukan Polis melalui P.U.B. (B) 621 bertarikh 19.12.1985, Ketua Polis Negara telah memutuskan iaitu anda dikenakan hukuman 'BUANG KERJA' terhadap keempat-empat dasar tindakan tatatertib yang berkenaan itu. Hukuman ini berkuatkuasa mulai tarikh anda menerima surat ini.

The letter was signed by the Timbalan Pengarah Pengurusan (Tatatertib) on behalf of the Ketua Polis Negara. It was clearly written under the direction and instruction of the Ketua Polis Negara as the opening words **"Adalah saya diarah ..."** signify in para. 1 therein. The Timbalan Pengarah Pengurusan was merely to convey the decision of the Ketua Polis Negara in dismissing the plaintiff.

In both the letters above, nothing therein can be construed to indicate or suggest that the Penolong Ketua Urusetia (Tatatertib) in exh. P5 or the Timbalan Pengarah Pengurusan (Tatatertib) in exh. P8 had either acted on their own or been delegated power or authority to make the kind of decisions specified in those letters. They were instructed to merely convey the decisions of the Pemangku Ketua Polis Negara and the Ketua Polis Negara respectively. In the circumstances, the question of delegation of power did not arise in this case.

In summary therefore, on the undisputed facts, evidence and the law and for the reasons stated, I hold that the plaintiff has not established on balance of probabilities all the claims except one against the defendants. Such claims are therefore dismissed accordingly. The one claim in which I hold the plaintiff to have succeeded for the reasons which I had given earlier, relates to the breach of the provisions of General Order 27(5) by the defendants. In consequence, I hold that the plaintiff is entitled to claim the amount of the unpaid portion of his salaries covering the period from 13 September 1990 (the date of interdiction) until 11 March 1994 (the date of dismissal). In this connection, I therefore order that an account be taken of this particular claim by the Senior Assistant Registrar on a date to be fixed by him. In view of the plaintiff's partial success, I think it appropriate to allow him half of the costs of this action to be taxed unless otherwise agreed.